United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2136

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEYMOUR KLONER,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

Docket No. 75-2136

B

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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I

A

The Government, with a plethora of citations and quotations, urges that Rule 11 was complied with because appellant understood his rights and knowingly waived them by his plea (Government Brief at 11-15). The short of the matter is that no constitutionally valid waiver (Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) appears on this record.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court made quite clear that a plea of guilty waives critical

constitutional rights, and left no doubt that the Federal constitutional standard of waiver was applicable. Citing to Carnley v. Cochran, 369 U.S. 506 (1962), to reiterate that waiver of the Sixth Amendment right to counsel cannot be presumed from a silent record, the Court stated

> ... that the same standard must be applied to determining whether a guilty plea is voluntarily made.... Several Federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state [*] criminal trial. First is the privilege against compulsory self-incrimination.... Second is the right to trial by jury... Third is the right to confront one's accusers.... We cannot presume the waiver of these three important Federal rights from a silent record.
>
> Boykin v. Alabama, supra, 395 U.S. at 243.

In a footnote to this text, the Court referred to Rule 11 as that "governing the duty of a trial judge before accepting a guilty plea." The failure to obtain such a waiver is as much a violation of Rule 11 as it is of due process.

The Government cites a series of cases for the proposition that "the failure to advise a defendant of one or more particular rights does not in and of itself warrant remedial action" (Government Brief at 13).** In response, it can only be said that Rule 11 does require relief when the defendant is not advised of his rights on the record of the plea, and that

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*The same is true of Federal criminal trials as well.

**This argument must be distinguished from the position that Rule 11 does not require a specific rigid use of language.

due process requirements must be vindicated if, on the whole record, there is no basis for finding a waiver. In McCarthy v. United States, 394 U.S. 458 (1969), the Court stated that Rule 11 procedures require that the trial judge interrogate the defendant personally, the better to ascertain the plea's voluntariness. The Court noted the three rights waived and the need for an intentional relinquishment of a known right, and instructed the courts to satisfy themselves of a factual basis for the plea while assuming that Rule 11

> ... direct[s] the judge to inquire into the defendant's understanding of ... the consequences of his plea....

The clear expression of the Supreme Court is that Rule 11 expects the judge to make the defendant aware of the constitutional rights involved and to obtain the defendant's informed consent to give them up in statements appearing on the record. Indeed, the Court could not make its position clearer than when it rejected the position that a failure to comply with Rule 11 could be corrected by a post-plea hearing with the burden upon the Government to prove voluntariness. McCarthy v. United States, supra, 394 U.S. at 470. The same rationale must apply to a knowing and understanding entry of a plea.*

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*To the extent that United States v. Fontero, 452 F.2d 406, 415 (5th Cir. 1971), cited by the Government, holds that the defendant need not be told under either Rule 11 or Boykin of the constitutional rights he waived, it is simply wrong and should not be followed.

Similarly, Boykin requires something on the record to show waiver. Indeed, the reference in Boykin to the standard in Carnley must settle this issue finally:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.
>
> Carnley v. Cochran, supra, 369 U.S. at 516.

Indeed, long before Boykin and McCarthy, a plea of guilty did not connote waiver and evidence more precise is necessary. Rice v. Olson, 324 U.S. 786 (1945); see also Todd v. Lockhart, 490 F.2d 626 (8th Cir. 1974).

Here, Rule 11 was violated because there was no reference to, discussion of, or colloquy about the Fifth Amendment right or, inversely, to the fact that the Government had the burden of proof. Contrast Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973). Further, Boykin was not complied with because there is no indication that appellant had knowledge of his rights from any other source. Contrast Wade v. Coiner, 468 F.2d 1058 (4th Cir. 1972). There is no possible way to infer a waiver from this silent record.*

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*If due process requires a valid waiver, it makes common sense to require that a knowing and intelligent waiver be put on the record so that more than mere lip service is paid to the principles which are said to support our legal system.

B

The Assistant United States Attorney apparently agrees with his associate who was present at the time the plea was entered in this case that no factual basis for the plea was established by the record of the pleading. The Government seeks to overcome this Rule 11 defect by reference to X v. United States, 454 F.2d 255 (2d Cir. 1971), in which this Court looked at the sentence minutes to sustain a plea. However, as Judge Mulligan made more than clear in X v. United States, such reference can be made in only pre-McCarthy cases.* Irizarry v. United States, 508 F.2d 960, 967 n.7 (2d Cir. 1975).

Even if the sentence minutes were available to correct the due process violation, as contrasted with a Rule 11 violation which occurred here, they are of no avail: there is no reference in those minutes to the amount of money taken, and that, under 18 U.S.C. §2113(b), is critical to the guilt of a defendant and his sentence. Further, there is no reference to "intent to steal." "Intent to steal" requires the

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*In its discussion of X v. United States, the Government conveniently omits any comment on the continuing reference in that opinion to the fact that the pleading in that case was pre-McCarthy, and that, under Halliday v. United States, 394 U.S. 831 (1969), McCarthy was not retroactive. The reaffirmation in the Boykin footnote, 395 U.S. at 243, that McCarthy relates to the burden on the judge who accepts the plea, should put to rest the Government's claim that X v. United States permits the defect in the plea proceeding to be cured by the sentencing minutes.

intention to deprive an owner of something permanently. Clark & Marshall, ON CRIMES, §12.04 at 825 (1967). Here there is no indication on the record that appellant had such an intent; in fact he stated that he had repaid all his past debts.

II

The Government claims alternatively that appellant cannot succeed on a §2255 application because the per se rule of McCarthy applies only to cases on direct appeal and that he can succeed in a §2255 proceeding only if he meets a higher and different standard of proof than the McCarthy rule demands. The law dictates a contrary conclusion on one of several grounds.

A

It must be noted that appellant claimed in his petition for writ of habeas corpus that he was unaware of his right to appeal and therefore was unable to attack his conviction on appellate review.*

There can be no question that a defendant who pleads guilty, just as any other convicted person, has the statutory right to appeal from the judgment (Coppege v. United States, 369 U.S. 438, 441 (1962); 28 U.S.C . §1291; Fed.R.A.P., Rule 3) and that a variety of issues affecting the validity of the plea (McCarthy v. United States, supra, 394 U.S. 459) can be raised. Issues relating to the sentence procedure such as

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*The Government's contention that this Court can grant no relief because the issues presented on the appeal were not raised below does not stand in the face of this allegation.

the accuracy and completeness of the probation report, the competency of counsel, the competency or mental status of the defendant, the attitude of the court, are proper appellate issues whether a defendant pleads guilty or proceeds to trial. Since, as appellant alleges and the Government acknowledges, appellant was unaware of his right to appeal,* he was improperly denied his right to appeal and was foreclosed from raising on appeal any challenge to the plea and sentence in this case. Since a direct appeal would require automatic reversal of the judgment because of the court's failure to comply with Rule 11 of the Federal Rules of Criminal Procedure (see Appellant's Brief at 11 and infra at 1-5), appellant must now be given the opportuny, by vacature of his sentence and reimposition of the judgment, to pursue the direct appeal he did not knowingly waive during the ten days after sentence was imposed.

Relief under 28 U.S.C. §2255 to reinstate the appeal is the appropriate remedy, for habeas corpus is the traditional means of regaining an improperly lost appeal. See Rodriguez v. United States, 395 U.S. 327 (1969). Further, if this Court accepts the Government's position that the Rule 11 violations which occurred here are not cognizable under §2255 (see Government's brief at 19), but only on direct appeal,

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*As the Government so amply pointed out, Rule 32(a)(2) of the Federal Rules of Criminal Procedure does not require that he be advised of his right.

the standards of Davis v. United States, supra, 417 U.S. at 436, even as the Government interprets them -- that §2255 is available to correct a fundamental defect in the proceedings -- require that this Court grant a §2255 application to restore the appeal. Appellant has a substantial right in seeking a direct appeal since, as the Government agrees, on direct appeal the per se rule of McCarthy would require nullification of the judgment where the plea was not knowingly entered and did not establish appellant's guilt.

B

The Government is also incorrect when it argues that, because §2255 is not a substitute for appeal, collateral relief based on the Rule 11 claims made here is not proper.

Whatever merit the Government's argument may have when the direct appeal is deliberately by-passed (but see Kaufman v. United States, 394 U.S. 217 (1969)), it is totally unavailable in cases such as this where the appellant did not know of his right to appeal, in part because of express Government policy not to advise him of his right. Since appellant could not deliberately by-pass his rights (Fay v. Noia, 372 U.S. 391 (1963); Humphrey v. Cady, 405 U.S. 504, 517 (1972)), the Government's citation to Sunal v. Large, 335 U.S. 174 (1947), to support its position, is misplaced. In Sunal, the Court refused to grant collateral relief becanse an appeal had not

been taken by the petitioners. The Court said:

> The normal and customary method of correcting errors of the trial is by appeal. Appeals could have been taken in these cases, but they were not. It cannot be said that absence of counsel made the appeals unavailable as a practical matter. See Johnson v. Zerbst, 304 U.S. 458, 467. Defendants had counsel. Nor was there any other barrier to the perfection of their appeals. Cf. Cochran v. Kansas, 316 U.S. 255.
>
> Sunal v. Large, supra, 332 U.S. at 177. Footnotes omitted.

In Cochran v. Kansas, 316 U.S. 255 (19), the defendant was prevented from taking his appeal by the conduct of prison officials. Here, appellant was denied his right because he was not disabused of his ignorance of the right to appeal because of judicial policy. Accordingly, §2255 is here used to compensate for appellant's inability to take his appeal and, as in other cases decided by this Court, §2255 is available to cure a Rule 11 violation.*

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*Reliance on United States v. Travers, 514 F.2d 1171 (2d Cir. 1975), is misplaced. Travers left open the question of whether the failure to pursue an appeal forecloses collateral relief, and it did not have before it an issue of by-pass.

C

Even under Davis v. United States, supra, 417 U.S. 333, appellant is entitled to relief either because of the Rule 11 violation described above or because of a due process violation under Boykin.* As was described earlier, neither the plea minutes nor the record as a whole reveal that there was a factual basis for each element of the crime (Vachon v. New Hampshire, 414 U.S. 478 (1974)), or a waiver of constitutional rights.

The errors here were not mere formalities. The reliance on the plea of guilty in our criminal process requires that the plea be constitutionally valid and in compliance with the standards imposed before acceptance. This is the only safeguard against abuses of the guilty plea procedure. The Government speaks of the bargain the defendant derives from entry of a guilty plea. If a defendant is not guilty or unknowingly gives up a right of which he would have availed himself had he known of it, there is no benefit to the process.

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*The Government's entire brief ignores this critical due process aspect of appellant's case.

IV

Point III of appellant's brief on appeal argues that the District Court should have examined the transcripts of the parole revocation hearing conducted by the U.S. Board of Parole to determine whether that hearing was in accord with standards of due process and whether the decision of the Board was an abuse of its discretion. The conclusion that the District Court had not examined the full records of the Parole Board proceeding resulted from the absence of any Parole Board records in the District Court file, the absence of any notation on the District Court docket sheet that such records had been filed with the District Court, and the absence of any reference to Parole Board procedures or evidence produced at the hearing in Judge Rayfiel's opinion.

In a letter dated February 12, 1976, from the United States Attorney for the Eastern District of New York to Judge Rayfiel, attached hereto as Appendix A, it was disclosed that the Parole Board file had been sent to Judge Rayfiel at his request through the U.S. Attorney's office. This file included a summary of the revocation hearing and "various correspondence of the Board in connection with Mr. Kloner's case." The letter continues:

> ... Since some of the material contained in that file was disclosed in confidence to the Board and is highly sensitive in nature, the Board requested that Your Honor examine such material in camera, and Mr. Marcus submitted it to you on that condition.
>
> Since Your Honor's decision denying Mr. Kloner's motions in the above matters is now

> on appeal to the Court of Appeals for the Second Circuit, I should like to request that the Board of Parole file materials which you reviewed be forwarded under seal to the Clerk of that Court, together with a request that such material be furnished to the members of the panel who will hear the appeal in this case ... on March 1, 1976, again on an in camera basis....

By order dated February 20, 1976, pursuant to a motion made by appellate counsel, counsel was permitted to examine the file "on condition that the information contained in the file not be imparted to any other person."

By amended order, this Court permitted the filing of sealed briefs containing references to this confidential information, with a second set of briefs excising such references.

The file of the Board demonstrates that there were substantial procedural violations warranting vacature of the decision revoking parole and reinstatement of appellant to parole.*

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*The transcript of the parole revocation hearing is not yet availabile, so we do not know precisely what evidence was presented or what statements were made. Thus, even now this Court's review of the validity of the proceedings can be only a partial review.

A. Revocation of parole was based on conduct not charged in the warrant application or by the Board.

Under the Parole Board's rules, the application for the warrant to arrest enumerates the alleged violations of parole, and this document is given to the parolee when he is returned to custody. 28 C.F.R. §2.52(b). The warrant application against appellant Kloner charged him with attempted grand larceny, larceny, and change of address without notification to his parole officer.

The hearing summary, which Kloner never saw, shows that the State court proceedings on the criminal charges were pending and unresolved and that the Board therefore made no findings as to whether either of those charges constituted a parole violation. The summary also shows that the Board found a parole violation by appellant's failure to report a change in residence and, under a category called "miscellaneous charges," notes that appellant left the jurisdiction without permission of his parole officer.

The notice of action, the Board's notice of decision, revokes parole because appellant failed to notify his parole officer of a change of address and because appellant departed without permission from the jurisdiction.

Since appellant was never given notice that he was charged with leaving the jurisdiction without notice, revocation on

ground violated due process. In Morrissey v. Brewer, 408 U.S. 471, 489 (1972), the Supreme Court stated:

> Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole....

The significance of notice of the charges was made unquestionably clear when the Court held that, even in prison disciplinary proceedings, where a lower degree of due process is acceptable than is allowed in parole hearings,

> ... written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense.
>
> Wolff v. McDonnell, 418 U.S. 539, 564 (1974).

Written notice is even required for Bureau of Prisons classification of special offenders. Cardaopoli v. Norton, 523 F.2d 990, 996 (2d Cir. 1975).

Appellant was thus unable to marshal facts relating to his departure from the country in June 1974. He had no opportunity to explain factors in mitigation or to call witnesses in support of his position. Kloner was thus unable to advise the examiners that the probation officer had advised him that he was not going to seek parole revocation because of the departure. Kloner was also unable to call his psychiatric witnesses to testify to the circumstances under which he had made

the trip.*

All this information is relevant to establishing that even if appellant's conduct violated parole, the circumstances did not warrant his return to custody:

> The [final revocation] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.
>
> Morrissey v. Brewer, supra, 408 U.S. at 488. Emphasis added.

See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Cooper v. Lockhart, 489 F.2d 308, 315-316 (8th Cir. 1973). Kloner was denied the opportunity to do this because he was not aware that such a charge had been made or that it would be the basis for revocation of parole.

Further, even though there was a finding that appellant violated parole because of other conduct, the Board may well have found that the conduct alone did not justify revocation.

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*Appellant did have such witnesses at the preliminary hearing to testify to his mental state in December 1974 and January 1975 as that related to the charge that he failed to report a change of address.

B. The Board used undisclosed, confidential information as evidence that appellant changed his permanent residence without advising his parole officer.

MATERIAL EXCISED PURSUANT TO COURT ORDER

These references in the hearing summary indicate that the examiners obviously considered this undisclosed information in reaching the decision to revoke appellant's parole. By so doing, however, the Board violated both its own rules and due process of law. Under Morrissey v. Brewer, supra, 408 U.S. at 489, and 28 C.F.R. §2.56(e), appellant had the right to be advised of the evidence against him so that he could respond to or deny it. See also Cardaropoli v. Norton, supra, 523 F.2d at 996.

Appellant was charged with changing his address without notifying his parole officer. He denied the charge, asserting that on at least two occasions he told his parole officer that he was temporarily living with Karen Fazenbaker, his girlfriend, because she was very ill.

MATERIAL EXCISED PURSUANT TO COURT ORDER

MATERIAL EXCISED PURSUANT TO COURT ORDER

the Board need not have revoked parole, but could have re-released appellant on condition that he undergo psychiatric care. 18 U.S.C. §4207; 28 C.F.R. §2.55(c). The Board's records show that at the preliminary hearing appellant presented the testimony of Dr. Marvin Meyers, a psychologist who had been treating appellant for about one year. Dr. Meyers stated that he

knew of appellant's state of mind in December 1974 and January 1975, the critical time period. Dr. Meyers explained that appellant was very depressed and paranoid at that time because of the illness of his girlfriend and the murder of his grandfather in the Crown Heights section of Brooklyn. It was explained that appellant felt there was a conspiracy against him and that his life was endangered. As a result of these feelings, he acted strange and impulsive, without rational patterns, and probably was not responsible for his actions. The doctor indicated appellant's need for psychiatric help, but felt that such help should be given on an out-patient basis, since incarceration would aggravate the depression.*

MATERIAL EXCISED PURSUANT TO COURT ORDER

*This appears in the report of the preliminary interview held on January 30, 1975.

C. Appellant did not have effective and loyal counsel in the parole process.

Under Gagnon v. Scarpelli, supra, 411 U.S. at 786, the Supreme Court stated that changes in the nature of a revocation hearing which are a consequence of the presence of counsel in some cases must be accepted so as to present the parolee's case. Counsel's role was described as that of an advocate, "bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views." Id., 411 U.S. at 787.

MATERIAL EXCISED PURSUANT TO COURT ORDER

the record as it is presently comprised reveals no effort by counsel to introduce psychiatric testimony, to advise the hearing examiners of Dr. Meyers' testimony at the preliminary hearing before the parole officer, or to make any

argument for a decision other than revocation based on appellant's mental state.

MATERIAL EXCISED PURSUANT TO COURT ORDER

D. The decision was not based on evidence before the Board.

Under Morrissey v. Brewer, supra, 408 U.S. at 489, the Board must state the evidence upon which a decision to revoke is made and the reasons for the decision. The Board revoked parole on the charge that appellant had not reported his address change to his parole officer, stating in the notice of decision that appellant had admitted the violation. This finding has no support in the record. To the contrary, both appellant and his friend have insisted at all times that they told the parole officer of his temporary residence and that, in fact, the officer the officer came to Karen's home.

The Board was under a due process obligation to state the

actual reasons for the revocation. Its failure to do so is error.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, the order below must be reversed and (1) the writ issued with the direction that appellant's direct appeal from the judgment of conviction be reinstated; (2) the writ issued with the direction with the direction that appellant's judgment of conviction be vacated; (3) the writ issued and appellant restored to parole.

Respectfully submitted,

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PBB:HGJ:ljl
F. #752,216

February 12, 1976

Honorable Leo F. Rayfiel
United States District Judge
Eastern District of New York
United States Courthouse, Room 448
225 Cadman Plaza East
Brooklyn, New York 11201

Att: Mr. Barney Cohen, Esq.

Re: Seymour Kloner v. United States
Docket Nos. 75 C 1212, 75 C 1379
75 C 1395

Dear Judge Rayfiel:

You will recall that, in connection with Your Honor's consideration of the above matters (as consolidated), your law clerk, Mr. Barney Cohen, Esq., requested that this office provide you with the record of the United States Board of Parole with respect to Mr. Kloner's parole revocation hearing held on February 24, 1975, and his subsequent administrative appeals to the Regional Director and the National Appeal Board. Over cover letter of September 10, 1975, Stanley Marcus, Esq., of this office submitted to you a certified copy of the Board of Parole's Kloner file, including a summary of the revocation hearing, various adminitrative appeals and decisions and further communications by Mr. Kloner to the Board, and various correspondence of the Board in connection with Mr. Kloner's case. Since some of the material contained in that file was disclosed in confidence to the Board and is highly sensitive in nature, the Board requested that Your Honor examine such material in camera, and Mr. Marcus submitted it to you on that condition.

Since Your Honor's decision denying Mr. Kloner's motions in the above matters is now on appeal to the Court of Appeals for the Second Circuit, I should like to request that the Board of Parole file materials which you reviewed be forwarded under seal to the Clerk of that Court, together

with a request that such material be furnished to the members of the panel who will hear the appeal in this case (75-2136) on March 1, 1976, again on an in camera basis.

If you have any questions concerning this matter, please telephone me at 596-6549 or 596-5093.

Your truly,

DAVID G. TRAGER
United States Attorney

By: _____
Herbert G. Johnson
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cc:
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